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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
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THE STATE OF ARIZONA, Appellee, v. ADAM WALTON, Appellant.	2 CA-CR 2010-0376 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080406

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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Attorneys for Appellee

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E S P I N O S A, Judge.

¶1 After a jury trial, Adam Walton was convicted of driving under the influence of intoxicating liquor (DUI) and aggravated driving with a blood alcohol concentration (BAC) of .08 or more having been convicted of two or more prior DUI violations. The trial court suspended his sentences and placed him on probation for a period of three years. On appeal, Walton argues the court erred by denying his motion to suppress his blood test results because his blood was seized without probable cause. For the reasons that follow, we affirm.

Factual Background and Procedural History

¶2 "In reviewing the denial of a motion to suppress evidence, we view the facts in the light most favorable to upholding the trial court's ruling" and consider "only the evidence presented at the suppression hearing." *State v. Wyman*, 197 Ariz. 10, ¶ 2, 3 P.3d 392, 394 (App. 2000). On an evening in June 2007, Walton was racing another vehicle at a high rate of speed when he lost control of his car, spun around, and crashed into a guardrail. Pima County Sheriff's Deputy Heather Lappin responded to the scene and saw that paramedics already had arrived and were tending to Walton's injuries resulting from the crash. As Lappin approached Walton, one of the paramedics informed her that he had smelled the odor of "intoxicants." In addition, a witness to the accident testified he had told either Lappin or the other deputy present that he had smelled alcohol while checking on Walton after the accident, although Lappin did not indicate in her testimony that she had received this information.

¶3 Deputy Lappin then spoke to Walton and observed symptoms consistent with intoxication, including red, watery, bloodshot eyes, and slurred speech. During that

contact, Walton yelled at Lappin and accused several witnesses, who had stopped to assist him, of running him off the road. Lappin subsequently went to the hospital where Walton had been taken and, after arrival, detected an odor of intoxicants on Walton. She then requested and was provided a sample of Walton's blood.

¶4 Subsequent testing of the blood revealed a BAC of .165 and Walton moved to suppress this evidence. Following a suppression hearing, the trial court denied the motion, finding Lappin had properly obtained the blood sample. Walton was convicted as noted above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶5 Walton argues the trial court erred in denying his motion to suppress his blood test results because his blood had been seized without probable cause. "'We review the trial court's ruling on a motion to suppress for clear and manifest error.'" *State v. Aleman*, 210 Ariz. 232, ¶ 8, 109 P.3d 571, 575 (App. 2005), *quoting State v. Clary*, 196 Ariz. 610, ¶ 8, 2 P.3d 1255, 1256-57 (App. 2000). "We defer to the trial court's factual findings that are supported by the record and not clearly erroneous." *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000).

¶6 "Under Arizona law, absent express consent, police may obtain a DUI suspect's blood sample only pursuant to a valid search warrant, Arizona's implied consent law, A.R.S. § 28-1321, or the medical blood draw exception in [A.R.S.] § 28-1388(E)." *Aleman*, 210 Ariz. 232, ¶ 11, 109 P.3d at 575. Section 28-1388(E) provides, in relevant part:

> [I]f a law enforcement officer has probable cause to believe that a person has violated [A.R.S.] § 28-1381[1] and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes.

¶7 In *State v. Cocio*, 147 Ariz. 277, 284, 709 P.2d 1336, 1345 (1985), our supreme court held that under § 28-1388(E), the warrantless removal of blood from a person suspected of DUI is constitutionally permissible if: (1) there is probable cause to believe the person has been driving under the influence of an intoxicant, (2) exigent circumstances existed, and (3) the blood is drawn for medical purposes by medical personnel. *See also Aleman*, 210 Ariz. 232, ¶¶ 12-16, 109 P.3d at 576-77 (applying *Cocio*'s three-part test). Because Walton did not consent to the blood draw, and no warrant was secured to authorize it, the state relies on § 28-1388(E) to justify the seizure.

¶8 Walton concedes that exigent circumstances existed and that his blood was drawn for medical purposes by medical personnel. But he challenges the trial court's determination that there was probable cause to believe he had driven under the influence of intoxicants. "Probable cause" exists when "reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense." *State v. Hoskins*, 199 Ariz. 127, ¶ 30, 14 P.3d 997, 1007-08 (2000). "Probable cause is something less than the proof needed to convict and something more than suspicions." *State v. Howard*, 163 Ariz. 47, 50, 785 P.2d 1235,

[1]A.R.S. § 28-1381 prohibits and declares unlawful the act of driving under the influence of intoxicants.

1238 (App. 1989). "We apply the law to the facts de novo in determining whether probable cause existed." *Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d at 577.

¶9 Walton first contends the trial court's ruling was incorrect because Deputy Lappin's testimony was "suspect." Walton points out she did not memorialize in her written report either having detected the odor of alcohol around him at the hospital or having observed his other symptoms of intoxication at the scene of the accident. He also asserts that she failed to mention these observations during an interview with defense counsel. It is the trial court, however, as the trier of fact in a suppression hearing, and not the appellate court, that determines witness credibility. *State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007). At the suppression hearing, counsel pointed out these inconsistencies during cross-examination, and thus they were brought to the court's attention. The court apparently resolved any inconsistencies between Lappin's testimony and her report and interview with defense counsel in her favor and we defer to its assessment. *See id.*

¶10 Walton further contends the trial court incorrectly relied on *Howard* in finding that probable cause existed. In that case, this court considered a finding of probable cause to seize a blood sample from a DUI suspect who had caused an automobile accident and an emergency medical technician had informed an investigating officer he had smelled intoxicants. *Howard*, 163 Ariz. at 49-50, 785 P.2d at 1237-38. We upheld the probable cause finding even though the officer did not interact with the suspect or independently verify the odor of intoxicants. *Id*. Walton argues that *Howard* does not apply in this case because, unlike the situation there, Deputy Lappin had a

chance to corroborate the emergency paramedic's observation regarding the smell of intoxicants and Lappin did not detect such when she interviewed Walton at the scene. As a result, he asserts Lappin lacked probable cause to seize his blood because the seizure was based entirely on the statement from the paramedic, which Lappin failed to corroborate.

¶11 As the state points out, however, Walton's argument fails because *Howard* held that law enforcement was not required to independently verify the paramedic's observation concerning the odor of intoxicants. 163 Ariz. at 50, 785 P.2d at 1238. And in any event, Lappin did verify the odor of intoxicants while with Walton at the hospital. Moreover, additional evidence presented at the suppression hearing supported the probable cause finding, including Lappin's observations at the accident scene of Walton's red, watery, bloodshot eyes; his slurred speech; and his aggression and confusion when he yelled at her and accused a group of bystanders of running him off the road.[2] Lappin's observations provided a valid basis for inferring that Walton had driven while intoxicated and, therefore, that probable cause existed for the blood draw. *See Aleman*, 210 Ariz. 232, ¶¶ 15-16, 18, 109 P.3d at 576-77 (affirming finding of probable cause for blood draw where defendant smelled of alcohol, defendant caused accident, and beer containers were observed in and around defendant's car); *Howard*, 163 Ariz. at 49-50, 785 P.2d at

[2]Walton cites several cases from other jurisdictions that suggest the mere fact of an automobile accident coupled with the odor of intoxicants is not enough to establish probable cause of intoxication. These cases, however, conflict with our conclusion in *Howard* that the odor of intoxicants around the suspect after he had been involved in an accident provided probable cause for a medical blood draw. 163 Ariz. at 49-50, 785 P.2d at 1237-38.

1237-38 (probable cause existed for blood draw where defendant who rear-ended another vehicle smelled of alcohol); *cf. Pharo v. Tucson City Court*, 167 Ariz. 571, 572, 574, 810 P.2d 569, 570, 572 (App. 1990) (probable cause to arrest defendant for DUI based in part on erratic driving, bloodshot eyes, slurred speech, and odor of intoxicants).

Conclusion

¶12 Because the trial court did not err in finding there was probable cause for the seizure of a sample of Walton's blood, his convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge